

No. 14799

United States
Court of Appeals
for the Ninth Circuit

GEORGE PEOPLES,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the District
of Oregon

Civil No. 7558

GEORGE PEOPLES, Plaintiff,
vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

MOTION

Defendant respectfully moves the court (pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure) for judgment in its favor and against the plaintiff on the ground and for the reason that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

This motion is based upon the pretrial order, heretofore executed and approved by the parties, the depositions and the collective bargaining agreement between the defendant and the Brotherhood of Railroad Trainmen.

Respectfully submitted,

/s/ KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled cause came on regularly for pretrial conference before the undersigned judge of the above entitled court on the 7th day of March, 1955. Plaintiff appeared in person and by William A. Babcock, his attorney. Defendant appeared by John Gordon Gearin, of its attorneys, and by W. A. Gregory, of counsel. The following proceedings were had:

Facts Agreed Upon

I.

Plaintiff is a citizen, resident and inhabitant of the State of Oregon. Defendant is a Delaware corporation duly authorized to do business in the State of Oregon.

II.

The action is one of a civil nature and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

III.

At all times material herein, defendant was engaged in the business of a common carrier by rail in interstate commerce and was engaged in such business in the State of Oregon. Defendant and some of its employees, including plaintiff, were subject to the terms and provisions of the National Railway Labor Act.

IV.

On December 16, 1939, defendant entered into a written collective bargaining agreement with the Brotherhood of Railroad Trainmen as the duly designated collective bargaining representative of certain of its employees, in the class or craft of trainmen, including employees in the position of brakemen. This agreement, entitled Schedule of Pay and Regulations for Trainmen, as amended from time to time, was in full force and effect at all times material herein. The collective bargaining agreement referred to above contained the following provisions:

“Article 47. Seniority Rights. Section (a). Yard employees will have no rights in train service, and vice versa, but if temporarily so assigned shall not lose their rights therein within sixty (60) days.

“Note: The above not to apply to trainmen used in yard service, who, account slack business, are unable to work 50% of the time as trainmen. Local Chairman and Local Officials shall determine percentage by checking back for a period of fifteen (15) days.

“Note: See Interpretation Agreement of April 2, 1942, TRN 1-299—Appendix “B”.

“Section (b). Freight trainmen in service June 1st, 1926, will be given rights as passenger trainmen in the order in which they rank as freight trainmen, but will follow and be junior to passenger brakemen in service June 1st, 1926.

“Section (c). Passenger trainmen in service June 1st, 1926, who are not over forty-five (45) years of

age, will be given rights as freight trainmen in the order in which they rank as passenger trainmen, but will follow and be junior to freight trainmen in service June 1st, 1926.

“Section (d). All trainmen entering service on and after June 1st, 1926, will qualify and hold rights in both passenger and freight service.

“Section (e). A passenger trainman acquiring rights as freight trainman under Section (c), will not be promoted to conductor until he has had at least two years' experience as freight trainman on railroad or railroads operated under American Railway Association Rules, and at least six (6) months of such experience shall be immediately prior to date of promotion and on division on which promoted. Time such trainmen are regularly assigned to assigned passenger service and/or regularly assigned to exclusive passenger trainmen's extra lists will be excluded in figuring their experience in freight service for promotion.

“Section (f). Universal rights of trainmen in steam service on Western District-Western Division, with trainmen in service on the Electric Lines of the Western District-Western Division, and vice versa, also promotion of gatemen in Western District-Western Division Electric service to positions of trainmen in both electric and steam service, will be governed by supplementary agreements which were in effect at the time this Agreement is executed, and thereafter subject to such changes, revisions or amendments, as may hereinafter be mutually agreed to by the parties to this Agreement.

“Seniority rights of trainmen of the former N.C.O. Railroad will be governed by supplementary agreements which were in effect at the time this Agreement is executed, and thereafter subject to such changes, revisions or amendments, as may hereinafter be mutually agreed to by the parties to this Agreement.

“Section (g). On divisions where there is sufficient passenger work to warrant assignment of trainmen to extra passenger service, it will be done, and these trainmen will provide themselves with uniforms. Local Committee, B. of R. T., and Local Officials will arrange to keep the number of brakemen on assigned extra lists reduced so that trainmen assigned thereto will earn approximately a regular passenger trainman’s monthly salary.

“Note: See Memorandum of Agreement of August 31, 1950, TRN 1-663—Appendix “B.”

“Section (h). At points where exclusive passenger lists are not maintained a sufficient number of extra trainmen will be required to provide themselves with uniforms and such men will have preference in filling passenger vacancies.

“In case extra trainmen decline to provide themselves with uniforms to properly take care of the extra passenger work the Company is privileged to hire men to man the service.

“Section (i). Trainmen with uniforms may be called for passenger service in the order of their seniority in preference to senior trainmen without uniforms. This not to conflict with the provisions of Article 16.

“Section (j). Trainmen who have not sufficient seniority to enable them to work with any degree of regularity on the division or seniority district where they hold seniority, may accept temporary transfer to another division or seniority district where additional men are required. Trainmen so transferred will be furnished necessary transportation for themselves and will deadhead to and from the point to which transferred on their own time.

“Trainmen temporarily transferred will take seniority rank on the district to which transferred as of date of first service, and shall retain such rank until released as a result of either the trainman’s own request, or being recalled to home division, or reduction in force. Should a trainman desire to make a permanent transfer to the division or seniority district to which temporarily transferred, and same is approved by Superintendents involved, seniority rank on the division or seniority district to which transferred will be as of 12:01 a.m. of date transfer is approved.

“Superintendents will furnish Local Chairmen, BRT, names of men borrowed from another division, or seniority district, showing seniority date of such men on the division or seniority district to which transferred.

“Should additional trainmen be hired on a division or seniority district during period borrowed men of another division or seniority district are working on said division or seniority district, such borrowed men will rank ahead and be senior to men so hired; however, when the working list is reduced,

the borrowed men will be first reduced in reverse seniority order. Superintendents will furnish Local Chairmen, BRT, names and date such men are removed from the seniority list.

“Trainmen voluntarily leaving the service of the Company lose all rights and if they again enter the service must take their place as new men.

“Section (k). Superintendents will prepare seniority lists of all trainmen under them, and have it open for inspection when requested. The list to be revised semi-annually, and each Chairman of Local Committee of B. of R. T. will be furnished a copy.

“Note: See letters of October 29, 1941, and November 7, 1941, TRN 154-269—Appendix “B.”

“Section (l). Trainmen in service on former N.C.O., on September 1st, 1929, will be given seniority rights as trainmen on West end of Salt Lake Division in the seniority order in which they rank on the former N.C.O. and will follow and be junior to trainmen on the seniority list of the West end of the Salt Lake Division, as of July 1st, 1937.

“Article 57. Discipline—Investigations. Section (a). When a trainman believes he has been unjustly treated, he shall have the right to present his case in writing, or through his Local Committee, to the Superintendent, with such evidence as he may have to offer. It will be the duty of the Superintendent to investigate the matter and render his decision in writing, without unnecessary delay. Should such decision be unsatisfactory it may on written notice to the Superintendent, be appealed to General Manager or his delegated representative.

General Chairman of the Brotherhood of Railroad Trainmen will be furnished copy of decision rendered on appeal.

“Section (b). No employe covered by this agreement will be disciplined or discharged without a fair and impartial formal investigation before a proper officer of the Company. At such investigation he will be entitled to be represented by the Local Chairman of his Organization, or by an employe of his choosing in the same grade of service on the employe’s seniority district. Nothing herein restricts suspension in proper cases pending investigation, which shall be prompt, ordinarily within five (5) days.

“Section (c). When a formal investigation is to be held the employe shall be given written notice as to the specific charge, time and place, sufficiently in advance to afford him the opportunity to arrange representation and for the attendance of any desired witnesses. A telegram will be considered written notice. The Company will require the presence of all employes whose testimony may be necessary to develop all of the essential facts. In fixing time at which investigation will be held due consideration will be given to the need of rest by employees.

“Section (d). Interrogations will be made by the presiding officer of the Company who is holding the investigation. After he has completed the direct examination, other Company officers present may interrogate the witness. The accused and/or his representative shall be confronted with all of the evidence, may hear the testimony of all witnesses and

shall be privileged to question any or all who may so testify. Each witness may, after testifying, remain present until the investigation is concluded. All questions and answers that constitute a part of the investigation shall be included in the transcript, also should the employe or his representative make verbal protest in regard to any question that he may consider unfair or ambiguous, such protest will be included in the record.

“Section (e). Any disciplinary action taken by the company shall be based upon the evidence adduced at the investigation, and employe or his representative notified of decision without undue delay; not exceeding thirty (30) days.

“Section (f). Where discharge (or suspension) is found to have been unjust, the employe shall be returned to service and paid for wage loss.

“Section (g). Should one or more employees involved not be available account sickness or injury, the investigation will be conducted with those who are available, and decision rendered as provided for in this Article. When the physical condition of those sick or injured will permit, investigation will be reconvened; those previously attending will be notified and will attend and participate should they, or either party to the investigation, desire their presence.

“Section (h). Trainmen taken from their runs for investigation if found innocent, or if required only as witnesses, shall be paid for all time lost, and when called as witnesses or for depositions and stenographic statements and lose no time, shall be

compensated at one-eighth of the daily rate of last service performed from time required to report until time released, with a minimum of one (1) hour.

“Note: See Interpretation Agreement of May 10, 1948, TRN 1-553—Appendix “B.”

“Section (i). When employees make written or typewritten statements at the request of the Superintendent, or his representative, if such statements do not include questions asked by the Superintendent, or his representative, and answers made by the employe, it will not constitute an investigation under this Article, but if such statements do include questions and answers as herein described, it will constitute an investigation and be subject to the provisions of this Article.

“It will not be permissible for clerks to conduct investigations; however, clerks may interview employes and take their statements in connection with irregularities which may or may not later require an investigation. Interviews and statements taken by Police Department will be confined to matters coming within the authority of Company Police Department.

“Section (j). Trainmen will not be required to sign waiver of investigation.

“Section (k). Should Chairman of Local Committee request a transcript of the testimony in any investigation that has been made, it will be furnished; Local Chairman will also be furnished copy of any additional statements or evidence which may be used against the accused in assessing discipline.

“Article 58. Limitation in Presenting Grievances. Section (a). The General Committee of the Brotherhood of Railroad Trainmen will represent all trainmen in the making of contracts, rates, rules, working agreement, and interpretations thereof.

“Section (b). The right of any employe desiring representation in the handling of his grievances or complaints by the Brotherhood of Railroad Trainmen under the recognized interpretation of the Agreement involved is conceded.

“Section (c). Item 1: Any claim of trainman not submitted in writing within 90 days of the date of the occurrence on which claim is based will be deemed to have been abandoned.

“Item 2: When time claims made within 90 days of the date of occurrence are declined, the employe affected, or his authorized representative, shall have 90 days from the date of notice declining claim to present a written grievance covering the claim to the Superintendent. If grievance is not filed within such 90-day limit the claim will be deemed to have been abandoned.

“Item 3: If grievance is filed within the 90-day limit, as provided in Item 2, and the claim is again declined, the employe, or his representative, shall have 90 days from the date of the latest decision of the Superintendent to advise the Superintendent in writing of intention to appeal to higher officer. If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned. General Chairman of the Brotherhood of Railroad

Trainmen will be furnished copy of decision rendered on appeal.

“Item 4: The above time limitations embodied in Items 2 and 3 shall also apply to disciplinary cases.

“Item 5: Time claims and disciplinary cases which have been denied by the Superintendent shall be submitted to the highest general officer of the carrier designated to handle such claims and cases and discussed in conference with said officer within one (1) year from the date of one of the following conditions, whichever is the latest:

- (a) Superintendent's last letter denying the claim or case;
- (b) Date of Local Chairman's letter notifying Superintendent of his intention to appeal the claim or case;
- (c) Date of Superintendent's letter submitting proposed Joint Statement of Facts;

subject to extension by mutual agreement. If not handled as herein prescribed, such claim or case will be deemed to have been abandoned.

“Item 6: The following provisions of Section 4(c), Item 2, of the Agreement made at Chicago, Illinois, December 12, 1947, reading:

‘Decision by the highest officer designated by the carrier to handle claims shall be final and binding unless within one year from the date of said officer's decision such claim is disposed of on the property or proceedings for the final disposition of the claim are instituted by the employe or his duly authorized representative and such officer is so notified. It is understood,

however, that the parties may by agreement in any particular case extend the one year period herein referred to.'

is interpreted to mean that the decision by the highest officer designated by the carrier to handle time claims shall be final and binding unless within one (1) year from the date of said officer's decision (made subsequent to discussion of the case in conference as provided in Item 5) proceedings for final disposition of the claim are instituted by the employe or his duly authorized representative and such officer is so notified, subject to extension by mutual agreement.

"Item 7: Unless an overpayment to a trainman for services rendered as a trainman is deducted by the Company within a period of 90 days after the date of the pay roll containing such overpayment, no deduction account such overpayment will thereafter be made, except when such overpayment results from clerical or accounting errors.

(Revised effective November 1, 1949)

"Section (d). Trainmen who are dismissed may be re-employed at any time; but will not be reinstated unless case is pending in accordance with provisions of Section (c) of this Article."

V.

On July 21, 1947, plaintiff was hired in the State of Oregon by defendant as brakeman and remained in its employ in this position in Oregon until November 24, 1952. During this time, plaintiff was employed within the craft or class covered by the

above described collective bargaining agreement and subject to the terms and provisions thereof.

VI.

On or about August 29, 1952, plaintiff was working as a brakeman from the extra board in Roseburg, Oregon. He had no regular assignment and worked on call by the defendant when and if work was available. During the year 1952 he had earned each month the following amounts:

1952

Jan.	1/P	NT
	2/P	246.96
Feb.	1/P	229.71
	2/P	44.09
Mar.	1/P	230.48
	2/P	131.50
April	1/P	303.13
	2/P	236.08
May	1/P	302.16
	2/P	220.13
June	1/P	105.16
	2/P	245.87
July	1/P	254.36
	2/P	76.19
Aug.	1/P	280.03
	2/P	114.36
Sept.	1/P	12.59
	2/P	NT
Oct.	1/P	210.74
	2/P	NT
Nov.	1/P	NT
	2/P	NT

Plaintiff was absent from work from August 29, 1952, until the date of his termination.

VII.

At that time, plaintiff resided at Ashland, Oregon.

VIII.

On November 5, 1952, defendant directed a letter by United States registered mail, addressed to plaintiff at Neil Creek Road, Ashland, Oregon. This letter was returned unclaimed to defendant on November . . . , 1952. This letter read as follows:

“Mr. George D. Peoples (Brakeman), Neil Creek Road, Ashland, Oregon. Our records show that you have been absent from work since August 29th, 1952, without proper authority. If this is a fact your absence is in violation of Rule 810 and unless it is due to good and proper reason, it is sufficient cause for the termination of your employment with this Company.

“You are, therefore, notified to appear for investigation at the Trainmaster’s Office, Roseburg, Oregon, at 10:00 a.m., Tuesday, November 18th, 1952, to cover your above-mentioned unauthorized absence.

“You are entitled to representation in accordance with the Trainmen’s Agreement and to bring to the investigation such witnesses as you may desire.

/s/ T. W. Bernard, Trainmaster.”

IX.

A formal investigation of charges against plaintiff was held at Roseburg, Oregon, before Mr. T.

W. Bernard, trainmaster, on November 18, 1952. A transcript of the investigation was made, which accurately sets forth the proceedings had. Following such investigation, Mr. Bernard recommended that plaintiff's employment be terminated for violation of Rule 810 of defendant's General Rules and Regulations.

X.

On November 24, 1952, L. P. Hopkins, Superintendent of the Portland Division, concurred with Mr. Bernard's recommendation and effectively directed that plaintiff's service be terminated as of that date for violating Rule 810.

XI.

On or about that date a letter was directed to plaintiff by defendant by United States mail, registered, addressed to plaintiff at Neil Creek Road, Ashland, Oregon. This letter on the 11th day of December, 1952, was returned to defendant unclaimed and read as follows:

"Mr. G. D. Peoples (Brakeman), Neil Creek Road, Ashland, Oregon. Evidence adduced at formal investigation conducted Roseburg November 18, 1952, at which neither you nor your representative was present, established your responsibility for continued absence from duty without proper authority since August 29, 1952.

"Your actions constitute violation Rule 810, Rules and Regulations of Transportation Department.

"For reason stated, your employe relationship

with Southern Pacific Company is hereby terminated.

/s/ L. P. Hopkins”

XII.

Plaintiff was absent from work from August 29, 1952, until his services were terminated on November 24, 1952. Plaintiff was not sick on August 29, 1952 and does not claim that he was unable to report to work because of his own sickness.

* * * * *

The following facts are admitted in addition to the above. However, as to each of them, plaintiff contends that they are not material or relevant to any issue in the case and should not be considered by the court or jury in any proceedings in the case.

* * * * *

XIII.

On January 10, 1952, M. S. Felter, Secretary Local 113, United Railroad Operating Crafts wrote a letter to Mr. L. P. Hopkins, Superintendent, which said letter was received by the office of Mr. Hopkins at Portland, Oregon on January 12, 1953, said letter being in words as follows:

“Mr. L. P. Hopkins, Supt., Union Station, Portland, Oregon. Dear Sir: On behalf of brakeman George Peoples I would like to hereby ask for your favorable consideration of his reinstatement with seniority unimpaired.

“The facts of the case are as follows: On about August 30, 1952 Brakeman Peoples was called to Nebraska by the serious illness of his father. He

laid off "account serious illness in the family." On his arrival at his father's home he found his condition critical and he was not expected to recover. He remained in this condition for some time and Brakeman Peoples complying with his father's pleas remained with him. As soon as his father's condition improved he returned to Oregon and found he had been removed from service.

"Mr. Peoples would like at this time to be permitted to return to service and be reinstated.

"There were several vouchers issued to Mr. Peoples which have been returned to Portland. He would like to have them sent to him at Ashland as soon as possible. Sincerely (signed) M. S. Felter, Secretary Local 113."

And enclosed written authorization executed by plaintiff, a copy of which has been marked Exhibit ..., authorizing the United Railroad Operating Crafts to represent the plaintiff. On January 12, 1953, Mr. L. P. Hopkins wrote Mr. M. S. Felter as follows:

"Mr. M. S. Felter, 321 Alta, Ashland, Oregon. Dear Sir: Your letter January 10th requesting reinstatement of Brakeman George Peoples, dismissed November 24, 1952 account violation Rule 810.

"Regret there is nothing that can be done towards giving favorable consideration to permit Mr. Peoples to return to service of Southern Pacific Company. Yours truly, (signed) L. P. Hopkins."

XIV.

On March 9, 1953, Mr. M. S. Felter wrote Mr.

L. P. Hopkins, said letter being received March 12, 1953, as follows:

“Mr. L. P. Hopkins, Superintendent, Southern Pacific Railroad, Union Station, Portland, Oregon. Dear Sir: At your earliest convenience I would like to confer with you regarding the possible reinstatement of George Peoples. Will you kindly advise me when I may see you in regards to this matter? Thank you. Sincerely, (signed) Marion S. Felter.”

XV.

On March 13, Mr. L. P. Hopkins wrote Mr. M. S. Felter as follows:

“Mr. M. S. Felter, 321 Alta, Ashland, Oregon. Dear Sir: Your letter March 9th relative George Peoples.

“I will be in my office 1:00 p.m., Monday, March 16th and can see you at that time. Yours truly, (signed) L. P. Hopkins.”

XVI.

On March 16, 1953, Mr. L. P. Hopkins wrote Mr. Felter as follows:

“Mr. M. S. Felter, 321 Alta, Ashland, Oregon. Dear Sir: Again referring your letter March 9th relative George Peoples.

“Under date March 13th, I wrote you as follows:

‘Your letter March 9th relative George Peoples.

‘I will be in my office 1:00 p.m., Monday, March 16th and can see you at that time.’

“Inasmuch as you did not show up for this appointment and have heard nothing from you ex-

plaining necessity for postponement, am taking it for granted it is not your desire to discuss the matter and am therefore closing my file. Yours truly, (signed) L. P. Hopkins."

XVII.

On March 19, 1953, Mr. Felter wrote Mr. Hopkins, which letter was received March 23, 1953 as follows:

"Mr. L. P. Hopkins, Superintendent, Room 251 Union Station, Portland 9, Oregon. Dear Sir: Your letter of March 13th evidently did not arrive in Ashland in time to be delivered on Saturday. It was delivered to my home Monday afternoon, March 16th. I did not get it until late Monday evening so it was not possible to keep the appointment at 1 p.m. Monday.

"I wish to thank you for your consideration in trying to arrange an appointment, however, I find there is some more information which must be available before we could discuss the matter further. If this should appear advisable I will again contact you for an appointment. Yours truly (signed) Marion S. Felter."

XVIII.

On August 29, 1953, plaintiff wrote Mr. L. P. Hopkins a letter received September 1, 1953, as follows:

"Mr. L. P. Hopkins. Dear Sir. I wonder if it is possible for me to get reinstated as Brakeman on the Port. Div. If so, I surely would be grateful to you for this deed. How ever if you don't see your way clear to reinstate me would you please send

me a service letter on your R.R. Sincerely, (signed) G. D. Peoples, Gen. Del. Ashland, Ore."

XIX.

On September 1, 1953, Mr. L. P. Hopkins wrote plaintiff as follows:

"Mr. G. D. Peoples, General Delivery, Ashland, Oregon. Dear Sir: Your letter August 29th regarding possibility of being returned to Southern Pacific service.

"Regret there is nothing we can do for you in this regard. Yours truly, (signed) L. P. Hopkins."

XX.

On September 3, 1953, Mr. L. P. Hopkins sent plaintiff Certificate of Service No. 51398.

XXI.

On November 25, 1953, Mr. M. S. Felter wrote to Mr. J. J. Sullivan, Manager of Personnel of Southern Pacific Company as follows. A copy of this letter was received by Mr. L. P. Hopkins.

XXII.

On January 6, 1954, Mr. E. D. Moody of Southern Pacific Company wrote to Mr. M. S. Felter as follows:

"Mr. M. S. Felter, 321 Alta, Ashland, Oregon. Dear Sir: Your letter of November 25, 1953, to Mr. J. J. Sullivan, Manager of Personnel, concerning the case of former Brakeman George D. Peoples, Portland Division, has been referred to me for reply, since I have been designated by the company as the highest general officer, pursuant to the pro-

visions of the Railway Labor Act, for the handling of all disciplinary matters on appeal.

“In reviewing the file, it was observed that no appeal was ever taken from the superintendent’s last decision within ninety days from the date upon which it was rendered to you; hence, according to the clear terms of Article 58 of the current Trainmen’s Agreement, the claim is deemed to have been abandoned, and your request that Peoples be reinstated and allowed compensation for time lost is not now properly before me for consideration. Yours very truly, (signed) E. D. Moody.”

XXIII.

Prior to August 29, 1952, defendant had issued its General Rules and Regulations for employees which were binding upon plaintiff and had from time to time issued certain Special Notices to employees.

XXIV.

Rule 810 of the General Rules and Regulations provided as follows:

“Employes must not engage in other business without permission of the proper officer. They must not absent themselves from their employment without proper authority. They must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty.

“An employe subject to call for duty must not absent himself from his usual calling place without notice to those required to call him.”

Plaintiff had knowledge of this regulation.

XXV.

On December 10, 1951, defendant had issued Special Notice No. 279, which provided as follows:

“Train, engine and yard service employes may not be absent for more than seven calendar days at one time without securing authority from Supervisor (Trainmaster, Road Foreman of Engines or General Yardmaster).

“Crew Dispatchers and others handling crew boards are not authorized to grant leaves for more than seven calendar days.

“In case of illness which may incapacitate an employe for more than seven days, it is necessary that proper advice be given to Supervisor, advice to include name of doctor attending, and written permission must be secured to cover leave.

“Leaves of absence should be anticipated as much as possible so they may be handled in orderly manner.”

XXVI.

On August 29, 1952, plaintiff caused a telegram to be sent from defendant's Ashland station to the crew dispatcher at the extra board in Roseburg, Oregon, reading as follows:

* * * * *

XXVII.

At no time did plaintiff secure authority from a Trainmaster, Road Foreman of Engines or General Yardmaster of defendant to be absent from work and at no time did he procure written leave of absence.

Contentions of the Parties

Plaintiff's Contentions

I.

Plaintiff's contract of employment with defendant included the terms and conditions in the collective bargaining agreement between the defendant and the Brotherhood of Railroad Trainmen. Under the terms of this agreement plaintiff had seniority rights as a brakeman in the Portland Division dating from July 21, 1947, which entitled him to work as a brakeman in that division to the extent that work was available and in order of seniority until he voluntarily quit or his services were validly terminated. Under the terms of his agreement he could not be discharged except in accordance with Article 57, subparagraphs (b), (c), (d) and (e) of the collective bargaining agreement and specifically could not be discharged without a fair and impartial formal investigation after written notice to the plaintiff of the specific charge and the time and place of the investigation.

II.

Plaintiff was discharged on November 24, 1952, without written or any notice to him of the charge and of the time and place of the investigation, and plaintiff had no knowledge of the charge or of the investigation. Plaintiff was never given a copy of the decision. He received no official notice of the decision until January 12, 1953. This action on the part of the defendant was a breach of its contract of employment with plaintiff and also a breach of

such a character that it excused any further performance of the contract of employment on the part of plaintiff.

III.

Plaintiff has fully performed all terms and conditions of his contract of employment on his part to be performed.

IV.

Article 57, subparagraph (a) of the collective bargaining agreement by its terms provides for a voluntary procedure on the part of the employees and does not require that an employe who is discharged use such a procedure. If it should be held that it was necessary under the facts and circumstances of the present case for plaintiff to use such procedure before filing an independent action for damages for breach of his contract of employment then plaintiff contends he has fully complied with this procedure.

V.

Article 58 of the collective bargaining agreement is to be construed with Article 57, subparagraph (a) of the agreement and by its terms provides for a voluntary procedure and does not require an employe who has been discharged to use such procedure in order to maintain an action for damages.

VI.

Because of the nature of the breach of the contract by the defendant the plaintiff was excused from using any of the grievance procedures pro-

vided for in the agreement even if such procedures are found to be mandatory in their terms and applicable to plaintiff's case.

VII.

The grievance procedures in Article 58 of the agreement contemplate proceedings before the National Railroad Adjustment Board and are preliminary to such procedures only and not preliminary to or prerequisites for an independent action for damages for breach of the contract of employment.

VIII.

It would have been futile for the plaintiff to have used or exhausted the contractual procedures and he is therefore excused from using them even if these procedures were otherwise required of him.

IX.

The plaintiff under applicable law as a result of his discharge by the defendant had the election of treating his contract as terminated and his discharge as a breach thereof, or of treating his discharge as void and seeking enforcement of the contract through the grievance procedures of the collective bargaining agreement and the administrative procedures of the National Railroad Adjustment Board. Plaintiff elects to treat his discharge as an effective breach of the contract and seeks his remedy in damages against the defendant.

X.

The action which has been taken by the plaintiff and on his behalf does not amount to an elec-

tion on the part of the plaintiff to resort to the administrative procedures of the National Railroad Adjustment Board which precludes his recovery of damages in an independent action.

XI.

Plaintiff has been damaged by the defendant's breach of his contract of employment in that he otherwise would have been entitled to and would probably have continued in the service of the defendant until he had reached retirement age. The amount of plaintiff's damage consists of the amount of earnings he has lost to date less the amount he did earn or could have earned by use of reasonable diligence, and the present value of the amount he probably would have earned as an employe of the defendant from this date until age 65, less the amount he probably will earn until that age or probably can earn by use of reasonable diligence. Plaintiff waives his claim for damages due to the loss of retirement benefits. The amount of plaintiff's damage for past wage losses consists of \$. The amount of damages for his future wage losses consists of \$. The burden of proof is on defendant to establish any reduction of damages by way of mitigation.

XII.

The defendant is not in any way excused from its failure to give plaintiff notice of the charges against him and the time and place of its investigation and affording him a fair and impartial investigation. Defendant had knowledge of plaintiff's

true address at the time by virtue of the knowledge of its agent at Ashland, to whom the plaintiff, by rule of the defendant and customary and accepted practice of the defendant, was instructed to report his address. Defendant did not make a reasonable effort to give such notice to the plaintiff and did not send the notice in the customary and accepted way, namely to the agent or chief clerk of plaintiff's home terminal, Ashland, Oregon, for delivery to plaintiff. It did not send it to plaintiff's last known post office address in Ashland, namely, P. O. Box 321. Defendant did not attempt to learn of plaintiff's address or whereabouts from the persons who would normally have been expected to know such address, namely, the agent and chief clerk at the defendant's station in Ashland, Oregon, and plaintiff's neighbors and landlord at Ashland, Oregon.

XIII.

The present action does not involve the issue of whether defendant had cause to discharge the plaintiff or whether plaintiff could have been justly discharged had the defendant complied with the provisions of plaintiff's contract of employment in effecting such discharge.

If it is held that the merits of the discharge are involved in the present case then plaintiff would make the following additional contentions with respect to such subject.

XIV.

It was customary and accepted practice in the Portland Division of the defendant's operations for

employees to lay off work for personal reasons for indefinite periods without securing any written leave of absence after seven days' absence.

XV.

It was also customary and accepted practice for employees who wished to lay off for personal reasons to notify the defendant that they were "laying off sick" and in such cases they were not expected or required to return until they were requested to do so. Such request to return to work was customarily and by practice given to the employe through the agent of the defendant who was in charge of operations in the employe's home terminal which, in this case, would have been the agent at Ashland, Oregon.

XVI.

On or before September 10, 1952, plaintiff notified defendant's station agent at Ashland, Oregon, that his post office address would be c/o E. B. Peoples, Avoca, Nebraska for an indefinite period and to mail his check to him at that address.

XVII.

The agent at Ashland, Oregon, at all times from on or before September 10, 1952, knew the plaintiff's address and could have got word to him to return to work.

XVIII.

On August 28, 1952, plaintiff learned that his father was critically ill at Avoca, Nebraska. He was requested by a member of the family to come to Nebraska to see his father. He thereupon notified

the person in charge at the Roseburg extra board, namely, the crew dispatcher, of these facts and was told he could have leave for this purpose on giving notice to that office. He gave such notice by telegram on August 29. Thereafter, plaintiff did not receive any notice to return to work. He was required to be absent because of his father's illness until on or about December 1, 1952, at which time he reported for work at Roseburg. He did not engage in any other business or occupation during this period. He had authority from defendant to be absent during this period.

XIX.

Other employees in the past had been absent for similar reasons for indefinite periods without being suspended from service and without disciplinary actions being taken against them.

XX.

Plaintiff had no knowledge of Special Notice No. 279 and the provisions of said notice were not complied with or followed in the operations. Plaintiff contends that he was given indefinite leave of absence by the crew dispatcher in Roseburg and this was binding on defendant and was not required to return to work until requested to do so as long as the cause for his leave reasonably continued.

XXI.

Alleged violation of Special Notice No. 279, and alleged financial difficulties of plaintiff were not given by defendant as a reason for plaintiff's dis-

Plaintiff had knowledge of this regulation.

charge or contained in the charges against him and did not constitute a valid basis for discharge or actually serve as such. Defendant is estopped and barred from urging them as such in the present action.

XXII.

Plaintiff's discharge was without good cause and was unjust.

* * * * *

Defendant denies each and all of the foregoing contentions on the part of plaintiff.

Defendant's Contentions

I.

Defendant contends that plaintiff was employed by Southern Pacific Company under a contract of employment terminable at will by either party.

Plaintiff denies the foregoing.

II.

Defendant contends that the contract between defendant and its employee represented by the Brotherhood of Railroad Trainmen did not alter or terminate the common law right of defendant to hire or to discharge or to terminate plaintiff's services at will.

Plaintiff denies the foregoing.

III.

Defendant contends that if said contract did limit the defendant's common law right to discharge or to terminate plaintiff's services at will and require

that discharge be for good cause, then and in that event defendant had good cause for discharging plaintiff for violation of General Rule and Regulation No. 810, for failure to comply with Special Notice No. 279 and for long continued absences from work.

Plaintiff denies the foregoing.

IV.

Defendant contends that plaintiff was absent from work for more than seven calendar days at one time without securing authority as provided in Special Notice No. 279 from a supervisor; i.e., trainmaster, road foreman of engines or general yardmaster.

Plaintiff denies the foregoing.

V.

Defendant contends that defendant made every reasonable effort to locate plaintiff and to give him notice of the investigation held on November 18, 1952 was compliance with the collective bargaining agreement.

Plaintiff denies the foregoing.

VI.

Defendant contends that plaintiff has neither followed the appeal procedure nor complied with the time limitation set forth in the contract between defendant and its employees represented by the Brotherhood of Railroad Trainmen, that the proce-

dures set forth are exclusive and plaintiff may not assert his rights, if any, under said contract in this proceeding.

Plaintiff denies the foregoing.

VII.

Plaintiff voluntarily absented himself from his employment without proper authority, notwithstanding the express requirement of Special Notice No. 279 and General Rule and Regulation No. 810 and instead of being sick was then in good health from August 29, 1952 until after November 24, 1952.

Plaintiff denies the foregoing.

VIII.

Defendant contends that plaintiff is wholly barred and estopped by his delay and failure to comply with the grievance procedure as set forth in Article 58 of the collective bargaining contract between defendant and the Brotherhood of Railroad Trainmen to seniority rights accruing to him under said contract or to damages for alleged breach of said contract by defendant.

Plaintiff denies the foregoing.

IX.

Plaintiff in permitting his financial distress and difficulties to be brought to the attention of the defendant was guilty of violating General Rule and Regulation No. 810.

Plaintiff denies the foregoing.

X.

Plaintiff has not minimized his damages by attempting to seek other employment.

Plaintiff denies the foregoing.

XI.

Plaintiff may not assert the instant claim against defendant when he has not complied with Article 54 of the agreement.

Plaintiff denies the foregoing.

XII.

Neither the court nor a jury can substitute its judgment for that of company officers exercised in good faith as to the measure of discipline to be assessed against a railroad employee for infraction of its rule.

Plaintiff denies the foregoing.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the court, except as otherwise indicated, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

1. W-2 Withholding Statement, year of 1951 to George Peoples from Southern Pacific Company.

2. W-2 Withholding Statement, year of 1952 to George Peoples from Southern Pacific Company.

3. Cancelled check of Southern Pacific Company to George Peoples for second payroll period of August, 1952.

4. Cancelled check of Southern Pacific Company to George Peoples for first payroll period of September, 1952.

5. Cancelled check of Southern Pacific Company to George Peoples for first payroll period of October, 1952.

Jury Trial

Plaintiff made timely request for trial by jury.

The parties hereto agree to the following pretrial order.

Dated at Portland, Oregon, this 7th day of March, 1955.

/s/ GUS J. SOLOMON,

Judge

Approved:

/s/ WM. A. BABOCK, Attorney for Plaintiff.

/s/ JOHN GORDON GEARIN, of Attorneys
for Defendant.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

MOTION

Plaintiff moves the Court (pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure) for a judgment in his favor and against

the defendant on the issue of liability of the defendant, reserving for trial the issue of the amount of damages sustained by plaintiff.

This Motion is made upon the ground that there is no genuine issue as to any material fact relating to the question of liability of the defendant, and the plaintiff is entitled to interlocutory judgment with respect to liability as a matter of law.

This Motion is based upon the pretrial order, the answers to interrogatories and the depositions on file herein.

Respectfully submitted,

/s/ WM. A. BABCOCK,
Attorney for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed March 14, 1955.

[Title of District Court and Cause.]

OPINION

Solomon, Judge:

April 8, 1955

Plaintiff's motion for summary judgment on the issue of liability is denied.

Defendant's motion for summary judgment is hereby granted.

Comment

In two earlier cases, *Lawrey vs. Southern Pacific Company*, Civil No. 6451, and *Barton vs. Southern Pacific Company*, Civil No. 6693, I held that an employee must exhaust his administrative

remedies in an employment contract before he can maintain an action at law for an alleged breach of such contract. In the Barton case, in my unreported opinion, after citing the case of Beck vs. General Insurance Company, 141 Ore. 446, 18 P.2d 579 (1933), I stated:

“I am convinced that the Oregon Supreme Court, in line with its own decisions and the decisions of other courts, would require compliance with the provisions of Rule 38(a) particularly in a case like this, in which it is not contended that the provisions of such rule are either arbitrary or unreasonable.”

Nothing contained in plaintiff's brief has caused me to alter the view which I expressed in the Barton case.

I am also of the opinion that plaintiff was required to comply with the applicable provisions of the collective bargaining agreement entered into between the defendant and the Brotherhood of Railroad Trainmen and that he failed to comply with the provisions of Article 58, Section (c), Item 3. I believe that this conclusion is in line with the holdings of this circuit. *Barker vs. Southern Pacific Co.*, 214 F.2d 918 (1954); see also *George E. Willman vs. Southern Pacific Company*, Civ. No. 5937, U. S. District Court for the Northern District of California, Northern Division, a case decided by Judge Dal M. Lemmon, then a District Judge, on July 22, 1948.

On the basis of my finding that the Oregon law requires the exhaustion of administrative remedies

in an employment contract, the case of Transcontinental & Western Airways, Inc. vs. Koppal, 345 U.S. 653 (1953), is also applicable.

In arriving at these conclusions, I have given serious consideration to the issue raised by the plaintiff that he was not properly notified of the charges being made against him and the time and place of the hearing as required by Article 57 of the agreement. I have also carefully read the letter of Mr. L. P. Hopkins, defendant's superintendent, to Mr. M. S. Felter, secretary of the union that was authorized to represent plaintiff. In Mr. Hopkins' letter of January 12, 1953, in answer to Mr. Felter's letter of January 10, requesting that plaintiff be permitted to return to service and be reinstated with his seniority unimpaired, Mr. Hopkins wrote:

“Regret there is nothing that can be done towards giving favorable consideration to permit Mr. Peoples to return to service of Southern Pacific Company.”

The defendant argues that this letter was accepted by plaintiff as a presentation of plaintiff's grievance as required by Article 58, Section (c).

In spite of the fact that the letter of Mr. Hopkins' does not so state, I have come to the conclusion that this letter to Mr. Felter must be given this interpretation and that Mr. Hopkins' letter amounts to a denial of the claim as provided in Item 3, Article 58, Section (c).

[Endorsed]: Filed April 8, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The motion of defendant, Southern Pacific Company, for summary judgment came on regularly to be heard before the undersigned judge of the above-entitled court. Plaintiff appeared by William A. Babcock, of his attorneys. Defendant, Southern Pacific Company, appeared by John Gordon Gearin, of its attorneys, and W. A. Gregory, of counsel. The court having considered the pretrial order, the memorandums of law filed herein, depositions and other pleadings and papers in the cause and being fully advised in the premises, now makes the following

Findings of Fact

I.

At the time of filing of said action, plaintiff was a citizen, resident and inhabitant of the State of Oregon and a non-resident of the State of Delaware. Defendant, Southern Pacific Company, was a Delaware corporation duly authorized to do business in the State of Oregon.

II.

The present action is one of a civil nature and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

III.

On December 16, 1939, defendant entered into a written collective bargaining agreement with the Brotherhood of Railroad Trainmen as the duly des-

ignated collective bargaining representative of certain of its employees in the class or craft of trainmen, including employees in the position of brakeman.

IV.

On July 21, 1947, plaintiff was hired in the State of Oregon by defendant as brakeman and remained in its employ in that position until November 24, 1952. During this period of time, plaintiff was employed within the craft or class covered by the aforementioned collective bargaining agreement and subject to the terms and provisions thereof. This is a civil action at law for breach of this contract, in which plaintiff claims that his employment by defendant was terminated by the latter in violation of the provisions of said collective bargaining agreement.

V.

On November 24, 1952, plaintiff was dismissed by defendant from the service of the latter, for violation of Rule 810 of the Transportation Department, which prohibits employees from leaving or remaining away from their employment without proper authority.

VI.

Article 58 of the applicable collective bargaining agreement, entitled "Limitation in Presenting Grievances", prescribes the steps which must be taken, and the time limitations governing each step, if the employee desires to challenge any action taken by the employer (defendant) with respect to his employment.

VII.

Plaintiff, on January 10, 1953, through his authorized representative, presented a written grievance claim to Superintendent L. P. Hopkins, plaintiff's superior officer, challenging the validity of his dismissal. This was accepted as compliance with Article 58, Section (c), Item 3, since the grievance was filed within the initial 90-day period next following his dismissal. On January 12, 1953, Superintendent Hopkins wrote to plaintiff's representative, declining plaintiff's claim, in accordance with Item 3.

VIII.

Article 58, Section (c), Item 3, of the aforesaid applicable agreement provides:

"Item 3. If grievance is filed within the 90-day limit, as provided in Item 2, and the claim is again declined, the employe, or his representative, shall have 90 days from the date of the latest decision of the Superintendent to advise the Superintendent in writing of intention to appeal to higher officer. If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned. General Chairman of the Brotherhood of Railroad Trainmen will be furnished copy of decision rendered on appeal."

IX.

From and after January 12, 1953, the date on which Superintendent Hopkins declined plaintiff's claim, no notice of intention to appeal to a higher

officer was given to the Superintendent in writing within 90 days, or at any time.

X.

Plaintiff did not comply with the grievance procedure, including the time limitations, set forth in the contract between defendant and the Brotherhood of Railroad Trainmen.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter of this action and of the parties thereto.

II.

Plaintiff's employment with defendant was governed by the terms of the collective bargaining agreement between defendant and its brakemen (trainmen) represented by the Brotherhood of Railroad Trainmen, effective December 16, 1939.

III.

Plaintiff cannot recover under the applicable collective bargaining agreement, because of his complete failure to comply with the successive steps set out in the agreement, which said steps were essential conditions precedent to the creation and maintenance of his cause of action.

IV.

There is no genuine issue as to any fact or facts material to defendant's motion for summary judgment.

ment in its favor. Defendant is entitled as matter of law to judgment herein against plaintiff, with costs.

Dated at Portland, Oregon, this 22 day of April,
1955.

/s/ GUS J. SOLOMON,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed April 22, 1955.

In the United States District Court for the
District of Oregon

Civil No. 7558

GEORGE PEOPLES, Plaintiff,
vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

JUDGMENT ORDER

The above entitled cause having come on regularly for pretrial conference and for hearing upon the plaintiff's motion for summary judgment on the issue of liability and the defendant's motion for summary judgment, the same having been argued for the respective parties and the court having considered the pretrial order, the memorandums filed, the depositions and other papers and pleadings in the cause and after deliberating and having heretofore filed and entered its opinion, findings of

fact and conclusions of law in favor of defendant, it is hereby

Ordered that plaintiff's motion for summary judgment be and the same hereby is denied in its entirety, and it is further

Ordered that defendant's motion for summary judgment be and the same is hereby granted in its entirety, and it is further

Ordered that defendant be and it hereby is granted judgment against the plaintiff.

Dated at Portland, Oregon, this 22nd day of April, 1955.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that George Peoples, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment Order entered in this action on April 22, 1955.

/s/ WM. A. BABCOCK,
Attorney for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas George Peoples the plaintiff in the above entitled Court and cause, appeals to the Circuit Court of Appeals, Ninth Circuit, from that certain Judgment Order rendered and entered in the above entitled Court and cause on April 22, 1955, in favor of the defendant Southern Pacific Company, a corporation, against the plaintiff George Peoples,

Now, Therefore, the undersigned, General Casualty Company of America, a corporation, organized and existing under the laws of the State of Washington, and duly authorized to transact surety business in the State of Oregon, as surety, does hereby undertake and promise on the part of said plaintiff and appellant to pay the costs of appeal in the amount of \$250.00 if the appeal is dismissed or the judgment affirmed and such costs as the Appellate Court may award if the judgment is modified.

In Witness Whereof, the said surety has caused these presents to be duly executed by its authorized officers and its corporate seal to be hereunder affixed this 20th day of May, 1955.

GENERAL CASUALTY COMPANY
OF AMERICA,

/s/ By LILLIAN H. ABEL, Attorney in Fact

Co-signed at Portland, Oregon, this 20th day of May, 1955.

[Seal] /s/ D. M. MARSTENS, Resident Agent

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure the plaintiff-appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by Notice of Appeal filed May 20, 1955, the following portions of the record, proceedings and evidence of this action:

1. Pre-Trial Order.
2. Interrogatories.
3. Answers to Interrogatories.
4. Answers to Interrogatories.
5. Motion (of defendant for summary judgment)
6. Motion (of plaintiff for summary judgment).
7. Findings of Fact and Conclusions of Law.
8. Judgment Order.
9. Notice of Appeal.
10. This designation and journal entries.
11. Statement of Points on Appeal.

Dated this 24 day of May, 1955.

BABCOCK, RUSSELL & McGEORGE
/s/ WM. A. BABCOCK,
Attorneys for Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 75(d) plaintiff-appellant files his statement of points upon which he intends to rely on the appeal in the above matter:

1. The Court erred in granting defendant's motion for summary judgment and in granting judgment against the plaintiff and in favor of the defendant.

2. The Court erred in denying plaintiff's motion for summary judgment.

3. The Court erred in entering its findings of facts numbered V, VI, VII, VIII, IX and X.

4. The Court erred in entering its conclusions of law numbered II, III and IV.

5. The Court erred in failing to enter findings of fact that:

(a) The plaintiff had a contract of employment with the defendant, which included the terms and conditions of the collective bargaining agreement between defendant and the Brotherhood of Railroad Trainmen. Under the terms of this contract of employment and the collective bargaining agreement plaintiff had seniority rights as a brakeman in the Portland division of defendant's operations which entitled him to employment as a brakeman to the extent that work was available and in order of seniority until he quit his employment or his services were validly terminated.

(b) Under the terms of plaintiff's contract of employment he could not be validly discharged ex-

cept in accordance with Article 57, Subparagraphs (b), (c), (d) and (e) of the collective bargaining agreement and could not be discharged without a fair and impartial formal investigation after written notice to the plaintiff of the specific charges against him and of the time and place of the investigation and he had the right to be present and to be represented at the investigation.

(c) The plaintiff was discharged on November 24, 1952, without being given written or any notice of the specific charge against him or of the time and place of the investigation and he was discharged without a fair and impartial investigation and without the opportunity to be present or represented.

(d) Plaintiff was damaged as the result of being discharged by the defendant. The amount of plaintiff's damage consists of the amount of earnings he has lost to date less the amount he did earn or could have earned by the use of reasonable diligence and the present value of the amount he probably would have earned as an employee of the defendant from date until age 65, less the amount he probably would earn or could have earned by the use of reasonable diligence during such period.

6. The Court erred in failing to enter conclusions of law that:

(a) The action on the part of the defendant in discharging plaintiff was a breach of its contract of employment with plaintiff and also a breach of such a character that it excused any further performance of the contract of employment on the part of plaintiff.

(b) Plaintiff has fully performed all terms and conditions of his contract of employment on his part to be performed.

(c) Article 57, subparagraph (a) of the collective bargaining agreement by its terms provides for a voluntary procedure on the part of employees and does not require that an employee who is discharged use such a procedure. In any event, plaintiff has fully complied with this procedure.

(d) Article 58 of the collective bargaining agreement is to be construed with Article 57, subparagraph (a) of the agreement and by its terms provides for a voluntary procedure and does not require an employee who has been discharged to use such procedure in order to maintain an action for damages.

(e) Because of the nature of the breach of the contract by the defendant the plaintiff was excused from using any of the grievance procedures provided for in the agreement even if such procedures were mandatory in their terms and applicable to plaintiff's case.

(f) The grievance procedures in Article 58 of the agreement contemplate proceedings before the National Railroad Adjustment Board and are preliminary to such procedures only and not preliminary to or prerequisites for an independent action for damages for breach of the contract of employment.

(g) The plaintiff under applicable law as a result of his discharge by the defendant had the election

of treating his contract as terminated and his discharge as a breach thereof, or of treating his discharge as void and seeking enforcement of the contract through the grievance procedures of the collective bargaining agreement and the administrative procedures of the National Railroad Adjustment Board. Plaintiff elected to treat his discharge as an effective breach of the contract and to seek his remedy in damages against the defendant.

(h) The action which has been taken by the plaintiff and on his behalf does not amount to an election on the part of the plaintiff to resort to the administrative procedures of the National Railroad Adjustment Board which precludes his recovery of damages in an independent action.

(i) The defendant is not in any way excused from its failure to give plaintiff notice of the charges against him and the time and place of its investigation and affording him a fair and impartial investigation.

(j) The present action does not involve the issue of whether defendant had cause to discharge the plaintiff or whether plaintiff could have been justly discharged had the defendant complied with the provisions of plaintiff's contract of employment in effecting such discharge.

(k) The plaintiff is entitled to a judgment against the defendant for damages for breach of his contract of employment by the defendant. The amount of the damages to be determined by a trial on this issue alone before the Court and a jury.

Dated this 24 day of May, 1955.

BABCOCK, RUSSELL & McGEORGE
/s/ WM. A. BABCOCK,
Attorneys for Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk, United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Order setting for pre-trial conference; Interrogatories to defendant; Answers to interrogatories; Order setting for pre-trial conference; Answers to interrogatories; Order setting for pre-trial conference; Order re-setting for pre-trial conference and argument on summary judgment; Motion of defendant for summary judgment; Record of hearing on summary judgment; Pre-trial order; Motion of plaintiff for summary judgment; Opinion; Court directs that opinion be filed; Findings of fact and conclusions of law; Judgment order; Notice of appeal; Undertaking for costs on appeal; Designation of contents of record on appeal; Statement of points on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of

said court in a cause therein numbered Civil 7558, in which George Peoples is the plaintiff and appellant and Southern Pacific Company, a corporation is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 22nd day of June, 1955.

[Seal] F. L. BUCK, Acting Clerk
/s/ By THORA LUND, Deputy

[Endorsed]: No. 14799. United States Court of Appeals for the Ninth Circuit. George Peoples, Appellant, vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 23, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14799

GEORGE PEOPLES,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD ON APPEAL

Pursuant to Rule 17 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit appellant ratifies and adopts as a statement of points to be relied on in the within appeal the statement of points filed by the appellant in the court below and appellant designates for inclusion in the record on appeal the following matters for printing:

1. Pre-trial Order.
2. Motion (of Defendant for Summary Judgment).
3. Motion (of Plaintiff for Summary Judgment).
4. Findings of Fact and Conclusions of Law.
5. Judgment Order.
6. Notice of Appeal.
7. Designation of Points of Record on Appeal (filed in the court below).

8. Statement of Points on Appeal (filed in the court below).

9. This Designation and Statement of Points.

Dated this 28th day of June, 1955.

BABCOCK, RUSSELL & McGEORGE
/s/ WM. A. BABCOCK,
Attorneys for Appellant

Certificate of Service attached.

[Endorsed]: Filed June 29, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION FOR PRINT-
ING ADDITIONAL PART OF RECORD

Pursuant to Rule 75(1) F.R.C.P. and to Rule 19 of this Court, appellee herewith designates for printing the following additional part of the record on appeal herein:

1. Opinion of Solomon, District Judge, of April 8, 1955.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Appellee

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 8, 1955. Paul P. O'Brien,
Clerk.